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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

11 DAVID BRIGHAM YOUNG.

| Case No. 2:12-cv-00091-KJD-GWF

12 Plaintiff.

13 | v.

14 MERCURY CASUALTY COMPANY.

Defendant.

**MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EXPERT REPORT OF
RICHARD CASS**

19 COMES NOW, Defendant MERCURY CASUALTY COMPANY, by and through
20 its attorneys of record, HAGER & DOWLING, P.C., and hereby files its Motion *in Limine*
21 to Exclude the Testimony and Expert Report of Richard Cass.

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1 This Motion is made and based upon the pleadings on paper and file herein, the
2 following points and authorities, and any oral argument the Court will entertain at the
3 hearing of the motion.

5 DATED this 23rd day of July, 2015.

HAGER & DOWLING

By

Benjamin J. Carman, Esq.
L. Renee Green, Esq.
Attorneys for Defendant
Mercury Casualty Company

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INTRODUCTION

17 Defendant Mercury Casualty Company (“Mercury”) seeks by this Motion an order
18 precluding the testimony and expert report of Richard Cass. The basis for this motion is
19 the fact that Mr. Cass’ testimony at his deposition, as well as his three reports, demonstrate
20 that the actual basis for nearly all of his opinions are conclusions of law. Rendering
21 “expert” opinions that range from alleged violations of NRS 686A.310 through acts of bad
22 faith that meet the “*Pemberton* standard,” Mr. Cass relies on cases, statutes, administrative
23 code, and even jury instructions in rendering his opinions. Though he halfheartedly made
24 vague reference to “industry standards” on occasion, when pressed he always cited to law
25 as the foundation for his opinions.

26 And the opinions themselves are mere conclusions of law. He opines that Mercury
27 acted in bad faith because it withheld documents in the first, dismissed bad faith suit. He
28 opines that jury instructions from another jurisdiction demonstrate Mercury acted in bad

1 faith because it breached fiduciary duties. He renders direct legal opinion, and barely even
 2 attempts to disguise it as expert testimony. Plaintiff's counsel also erroneously believes
 3 that Mr. Cass can testify to ultimate issues or draw legal conclusions. For these reasons,
 4 the Court should preclude all such testimony, opinions, references to testimony, and
 5 evidence presented by Mr. Cass.

6 **II.**

7 **ARGUMENT**

8 Expert witnesses cannot testify as to their opinion on the state of the law or give
 9 legal conclusions. *U.S. v. Tammam*, 782 F.3d 543, 552 (9th Cir. 2015); *Buzz Stew, LLC v.*
 10 *City of N. Las Vegas*, 341 P.3d 646, 651, 131 Nev. Adv. Op. 1 (Nev. 2015), Fed.R.Evid.
 11 702(a) (2014). "Expert testimony is not proper for issues of law." *Crow Tribe of Indians*
 12 *v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996). "[I]nstructing the jury as to the applicable
 13 law is the distinct and exclusive province of the court." *Hangarter v. Provident Life &*
 14 *Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004); Fed.R.Evid. 702 (2014).

15 In *Cass Information Systems*, an insurance company appealed to the Ninth Circuit
 16 Court of Appeals the lower court's decision to exclude an expert's testimony regarding the
 17 expert's legal conclusions related to the duties that a business was required to follow.
 18 *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1058
 19 (9th Cir. 2008). In its appeal, the insurer claimed that its experts should be allowed to use
 20 terminology from applicable law in expressing their opinions. *Id.* at 1059. Although the
 21 court recognized that an expert could discuss facts in evidence even if they are couched in
 22 legal terms, the expert cannot instruct the jury on legal issues or state an opinion as to an
 23 ultimate issue of law. *Id.* at 1058-1059. To do so invaded the province of the Court. *Ibid.*
 24 The Court affirmed the lower court's ruling of excluding the expert's assertions of
 25 numerous legal conclusions. *Ibid.*

26 Mr. Cass' reports contained numerous legal conclusions, most of which pertained to
 27 his opinions of how Mercury violated the Unfair Claim Practices Act. See **Exhibit A**,
 28 Richard Cass' Report dated February 1, 2013; **Exhibit B**, Richard Cass' Report dated

1 February 9, 2013; **Exhibit C**, Richard Cass' Report dated May 9, 2015. He also cited and
 2 copied excerpts of jury instructions and case law to support his legal analysis. See *Ibid*.

3 For example, Mr. Cass declared that Mercury violated NRS 686A.310(a) when it
 4 supposedly did not describe benefits under the Underinsured Motorist coverage¹. See
 5 Although Mr. Cass disguised these violations as "standards," he solely quoted the law and
 6 gave his legal opinion of Mercury's actions that allegedly violated the law. See *Ibid*. He
 7 even admitted to such during the deposition by purely citing the Nevada Administrative
 8 Code and Nevada Revised Statutes to support his opinions while citing no industry
 9 standards.² He further admitted that his interpretation of case law, statutes and regulations
 10 are not considered industry standards³.

11 He also erroneously stated that Mercury violated the Unfair Claim Practices Act
 12 during litigation after Mr. Young's claim file was closed⁴. He even opined what an
 13 attorney's conduct should be with opposing counsel after litigation commenced in relation
 14 to the attorney's separate code of ethics when in fact he is not an attorney. *Ibid*. By
 15 asserting that Mercury violated the law by making legal conclusions, Mr. Cass went
 16 beyond his scope as an expert and entered the province of the Court, which is improper.
 17 See [Hangarter](#), 373 F.3d at 1016.

18 Mr. Cass also claimed Mercury violated NRS 686A.310(a) when Mercury
 19 supposedly failed to notify Mr. Young that he may need to take an examination under oath
 20 ("EUA") at the beginning of the claim and later requested an independent medical
 21 examination ("IME")⁵. However, to support his claims, he only cited to law and offered
 22 his legal interpretation as to how Mercury violated that law⁶.

23 Mr. Cass also went beyond his authority as an expert when he legally concluded
 24 that Mercury violated NRS 686.310(c). Specifically, Mr. Cass claimed that Mercury

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 26 ¹ **Exhibit A**, p. 3; **Exhibit B**, p. 3; See **Exhibit D**, excerpts from the transcript of Richard Cass' Deposition pp. 57:6-57:9;
Exhibit C, p. 2.

27 ² **Exhibit D**, pp. 57:19-57:20; 58:14-58:20; 64:10-65:10; 73:24; 74:18, 209:1-209:18

28 ³ **Exhibit D**, pp. 140:2-140:8, 226:3-226:8

⁴ **Exhibit A**, p. 3; **Exhibit B**, p. 2; **Exhibit D**, pp. 80:20-82:13

⁵ **Exhibit A**, p.4; **Exhibit B**, p. 4; **Exhibit C**, p.3

⁶ *Ibid*., **Exhibit D**, pp. 111:9-113:8

1 violated NRS 686A.310(c) when it supposedly failed to provide certain material to
 2 opposing counsel during litigation⁷. He also claimed that Mercury violated this statute
 3 when it supposedly failed to obtain statements from third parties who refused to speak with
 4 the insurance company⁸.

5 Although he claimed that Mercury's litigation conduct is bad faith, he cited nothing
 6 other than statutes or the Nevada Administrative Code to support his conclusion that
 7 Mercury violated the law⁹. *Id* at pp 5-6; Again, he relies on his opinion from speaking
 8 with other attorneys and reading case law such as *Pemberton* in establishing his erroneous
 9 legal conclusion that Mercury committed bad faith during litigation¹⁰. Asserting his
 10 opinion regarding how Mercury violated the law surmounts to him providing a legal
 11 conclusion, which is improper because he attempts to instruct the jury to the applicable law
 12 regarding bad faith and violations under the Unfair Claim Practices Act. *Ibid*; Cass
 13 Information Systems, Inc., 373 F.3d at 1016.

14 Improperly citing to case law and using that as evidence that Mercury supposedly
 15 violated the law also demonstrates that Mr. Cass extended his boundaries beyond
 16 permissible expert testimony. *Ibid*. In his report and during his deposition, Mr. Cass
 17 specifically cited the Nevada Supreme Court case *Pemberton* in supporting his position
 18 that Mercury's alleged conduct during litigation were actions of bad faith¹¹. Mr. Cass even
 19 admitted that his only basis for making this conclusion that Mercury's alleged litigation
 20 conduct constituted bad faith was based of his interpretation of *Pemberton* and other
 21 similar cases¹². *Ibid*. Experts cannot express their opinion as to questions of law. Cass
 22 Information Systems, Inc., 373 F.3d at 1058. Rather, this duty is left for the Court. *Ibid*.
 23 Due to Mr. Cass improperly providing legal opinions and testimony regarding how
 24 Mercury violated NRS 686.310, his testimony regarding these matters should be excluded.
 25 *Ibid*.

26⁷ **Exhibit A**, p .5; **Exhibit B**, p. 5
 27⁸ **Exhibit C**, p. 4
 28⁹ **Exhibit D**, pp. 59:23-60:6, 60:16-61:6
¹⁰ **Exhibit D**, pp. 85:4-90:1
¹¹ **Exhibit A**, p. 5; **Exhibit B**, p. 5; **Exhibit D**, pp. 62:4-63:22
¹² **Exhibit D**, pp. 78:25-80:18, 138:20-139:1

1 Mr. Cass continued to improperly provide his legal conclusions of how Mercury
 2 violated the law when he claimed that Mercury violated NRS 686.310(e)¹³. NRS
 3 686.310(e); Specifically, Mr. Cass overreached his ability to give expert testimony when
 4 he legally concluded that Mercury supposedly violated NRS 686.310(e) when it found Mr.
 5 Young at fault for the accident¹⁴. *Ibid*;

6 He also improperly and legally concluded that Mercury violated this section of the
 7 law when it supposedly failed to inform Mr. Young about the medical records in its
 8 possession or inform Mr. Young of reasons for Mr. Young to undergo an IME and EUO¹⁵.
 9 Just as the Court in *Cass Information Systems, Inc.* affirmed that aspects of the expert
 10 witness's testimony were not admissible because it provided legal conclusions, Mr. Cass'
 11 testimony and reports are not admissible because they are filled with legal conclusions and
 12 erroneous interpretations of the law. See *Cass Information Systems, Inc.*, 373 F.3d at
 13 1058.

14 The continuation of Mr. Cass exceeding the scope of expert testimony evidences
 15 itself when he further claimed that Mercury violated NRS 686.310(f) when it allegedly
 16 compelled Mr. Young to institute litigation to recover amounts due under the insurance
 17 policy¹⁶. Mr. Cass also cited to jury instructions from another jurisdiction to claim that
 18 Mercury committed bad faith¹⁷. Mr. Cass admitted that jury instructions are nowhere to be
 19 found in any coursework for the certifications that he obtained¹⁸. As stated previously and
 20 for the same reasons, Mr. Cass' testimony regarding his interpretations and conclusions of
 21 the law should be excluded. See *Cass Information Systems, Inc.*, 523 F.3d at 1058.

22 Mr. Cass also exceeded permissible testimony when he opined Mercury violated
 23 NRS 686.310(n) when it allegedly failed to pay Mr. Young when liability was certain¹⁹. ;
 24 Once again, Mr. Cass cited no industry standard or practice. *Ibid*. Rather, Mr. Cass
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26 ¹³ **Exhibit A**, p. 6; **Exhibit B**, p. 6; **Exhibit D**, pp. 132:24-133:13, 167:13-167:22; **Exhibit C**, p. 7

27 ¹⁴ **Exhibit D**, pp. 133:10-133:20; **Exhibit A**, p. 6; **Exhibit B**, p. 6; **Exhibit B**, p. 8

28 ¹⁵ **Exhibit D**, pp. 134:4-135:2

29 ¹⁶ **Exhibit D**, pp. 167:10-168:1

30 ¹⁷ **Exhibit D**, pp. 168:2-168:19; **Exhibit A**, p. 7; **Exhibit B**, p. 7

31 ¹⁸ **Exhibit D**, pp. 169:4-169:18

32 ¹⁹ **Exhibit D**, pp. 169:22-171:5; **Exhibit A**, p. 6; **Exhibit B**, p. 6

1 provided his legal conclusion in matters from which is the province of the Court. Thus, his
 2 reports and testimony should be excluded. *Cass Information Systems, Inc.*, 523 F.3d at
 3 1058.

4 Moreover, he used jury instructions to indicate the law that a jury would be given in
 5 this case and even admitted to such²⁰. Mr. Cass provided legal conclusions regarding
 6 whether a person owes a duty as a driver, which is also improper. *Ibid.* An expert cannot
 7 instruct a jury or assert legal conclusions as to the applicable law because that ability is
 8 reserved for the distinct and exclusive province of the Court. *Hangarter*, 373 F.3d at 1016.

9 Plaintiff's counsel is bold and does not conceal the fact it believes Mr. Cass can
 10 testify as to ultimate issues and legal conclusions. See **Exhibit E**, Emails between
 11 Mercury's counsel and Young's counsel dated July 22, 2015. Plaintiff's counsel also
 12 erroneously stated that Mr. Cass could testify as to his legal opinions on the false basis that
 13 he graduated from the University of Arizona law school. *Ibid.* Not only did he not
 14 graduate from law school, he is not an attorney²¹. Moreover, it is well established law that
 15 experts cannot testify about the law and thus Mr. Cass' reports and testimony must be
 16 excluded. See *Raicot*, 87 F.3d at 1045; *Hangarter*, 373 F.3d at 1016; *Cass Information*
 17 *Systems, Inc.*, 523 F.3d at 1058; *U.S. v. Tammam*, 782 F.3d at 552.

18 CONCLUSION

19 Mr. Cass repeatedly makes legal conclusions as to his beliefs of how Mercury
 20 violated the law and gives legal instruction that would be provided to a jury. This use of
 21 expert testimony is improper and should only be reserved for the Court. Though it is
 22 anticipated Mr. Young will argue that Mr. Cass was simply stating industry standards, his
 23 testimony demonstrates amply that his sole basis for his opinions are his own legal
 24 conclusions. As a person who completed at least two years of law school, it is apparent
 25 Mr. Cass is more than willing to share his legal opinions, supported by law and even jury
 26 instructions, under the guise of expert testimony. This is improper. Due to Mr. Cass'
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²⁰ **Exhibit D**, pp. 192:5-192:16; 193: 2-193:19; 226:14-226:23

²¹ **Exhibit D**, pp. 6:23-7:11

1 failure to provide expert testimony within the parameters of the law, Mercury asks that Mr.
2 Cass' report and testimony be excluded from trial.

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4 DATED this 23rd day of July, 2015.

5

6 HAGER & DOWLING

7

8 By



9 Benjamin J. Carman, Esq.
10 L. Renee Green, Esq.
11 Attorneys for Defendant
Mercury Casualty Company

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PROOF OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada. My business address is 4045 Spencer Street, Suite 408, Las Vegas, Nevada 89119.

On July 23, 2015, I served true copies of the following document(s) described as **MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EXPERT REPORT OF RICHARD CASS** on the interested parties in this action as follows:

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VIA THE UNITED STATES DISTRICT COURT CM/ECF SYSTEM

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 23, 2015, at Las Vegas, Nevada.



An employee of HAGER & DOWLING